

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Annual Assessment of the Status)	CS Docket No. 02-145
Of Competition in Markets for the)	
Delivery of Video Programming)	

**COMMENTS OF
THE STATE OF HAWAII**

The State of Hawaii (“the State”),¹ by its attorneys, hereby submits its comments to the Commission’s Notice of Inquiry (“*NOI*”) in the above-captioned proceeding.² In its *NOI*, the Commission seeks comment on “the most significant changes or developments in the past year” with respect to competition in the provision of multichannel video programming.³

I. THE COMMISSION’S JUNE 2002 DBS ORDER CLARIFIED AND REINFORCED THE GEOGRAPHIC SERVICE OBLIGATIONS OF DBS OPERATORS

For consumers in Hawaii, the most significant development of the past year was the release by the Commission of an order in June 2002 reinforcing the geographic

¹ The State herein comments through the Hawaii Department of Commerce and Consumer Affairs (“the Department”). A division of the Department – the Cable Television Division – is the State’s cable franchise administrator.

² See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, CS Docket No. 01-129, 66 Fed. Reg. 35431 (rel. June 25, 2001) (“*NOI*”).

³ *Id.*, ¶ 4.

service rules that it adopted in 1995 for DBS operators.⁴ In the order, the Commission acknowledged “the importance of establishing DBS as a competitor to cable in the multi-channel video programming distribution market in the States of Hawaii and Alaska.”⁵ The Commission indicated that it “remains concerned that the DBS service available to residents of Alaska and Hawaii is significantly different from that provided in the Mainland 48 states.”⁶ In order to compel compliance with its rules, the Commission indicated that it would “continue to work with DBS operators, particularly with Directv, and the States to ensure that DBS licensees provide the service required under our rules.”⁷

In clarifying the scope of its geographic service requirements, the Commission indicated that it “expect[s] that DBS operators will offer the same level of service to customers throughout all 50 states” and it mandated “that DBS operators must offer packages of services in Alaska and Hawaii that are reasonably comparable to what they offer in the contiguous 48 states.”⁸ The Commission also strongly encouraged DBS operators to serve consumers in Alaska and Hawaii using earth station receive dishes that

⁴ *Direct Broadcast Satellite Service*, FCC 02-110 (June 13, 2002) (“*Part 100 Order*”).

⁵ *Id.*, ¶¶ 50, 65; *see also id.*, Joint Statement of Commissioners Kevin J. Martin and Kathleen Q. Abernathy (noting that “[c]onsumers in these two states deserve access to similar DBS service options as their counterparts in the Mainland”); *id.*, Separate Statement of Commissioner Michael J. Copps Dissenting in Part, Approving in Part (indicating that “I was open to going even further to ensure that the citizens of Alaska and Hawaii receive packages of services comparable in programming, price and quality to those available to citizens of the mainland states”).

⁶ *Id.*, ¶ 72.

⁷ *Id.*, ¶ 53.

⁸ *Id.*, ¶¶ 65, 72.

are comparable in size to the equipment utilized in the mainland states. The Commission indicated that DBS providers would be subject to liability for failure to comply with its rules 60 days after the order's Federal Register publication.⁹

Shortly after the Commission released its order, EchoStar announced that it was initiating local-into-local broadcast television programming for Honolulu. The State welcomes this encouraging development and is reviewing EchoStar's menu of available subscriber packages in order to assess overall compliance with the Commission's rules.

In contrast, the State has yet to receive any indication that DirecTV is taking steps to come into compliance with the Commission's geographic service rules. The State will continue to monitor the situation after the effective date of the order and will contact DBS licensees about their efforts towards compliance. If the State's inquiries identify a potential lack of compliance, the State will bring the situation to the attention of the Commission.

II. THE COMMISSION SHOULD ENSURE THAT NON-U.S. LICENSED DBS OPERATORS COMPLY WITH THE GEOGRAPHIC SERVICE RULES WHEN SERVING THE UNITED STATES

A second major development of the past year was a proposal by a non-U.S. licensed DBS operator to provide DBS service to consumers in the 48 mainland states, but possibly not to consumers in Alaska and Hawaii. SES Americom requested Commission authority to begin providing DBS in the United States from the 105.5° W.L. orbital position, even though the operator has not yet determined whether its service area would include all fifty states.

⁹ See *id.*, ¶ 72 n.254.

Although the State would welcome the launch of a new DBS network to serve the United States, it is critically important for the network to serve consumers in Alaska and Hawaii. Otherwise, the new network would widen the gap between the competitive multichannel video and direct-to-home data services that are available in the mainland 48 states and those that can be received in Alaska and Hawaii. Any programming service that is carried on SES Americom's satellite would most likely never be available to consumers in the two states. Furthermore, to the extent that SES Americom's service further saturates the satellite video distribution market in the mainland, SES Americom's proposal would greatly reduce the possibility that other satellite companies might launch in the future additional DBS satellites that could serve consumers in all fifty states.

The Commission reaffirmed in its June 2002 DBS order that non-U.S. licensed DBS operators must comply with the Commission's geographic service rules.¹⁰ The Commission should therefore direct SES Americom to take steps to comply with the geographic service requirements. Specifically, the Commission should refrain from authorizing SES Americom to serve the United States until the applicant has completed coordination negotiations with other DBS operators in order to achieve service to Alaska and Hawaii using the 105.5° W.L. orbital position. If this effort is unsuccessful, the Commission should assist SES Americom in identifying other orbital positions or

¹⁰ See *id.*, ¶ 91. The Commission observed that "if non-U.S.-licensed satellites are not subject to the same requirements, they will have an unfair competitive advantage over domestic licensees." *Id.*, ¶ 92.

spectrum bands that could be used to provide DBS to all fifty states.¹¹ Alternatively, SES Americom might consider using multiple orbital positions to provide adequate cover of the United States.

Granted, such an approach might not provide SES Americom with the same synergies that would result from positioning a satellite at the 105.5° W.L. orbital slot. Many large satellite operators, however, successfully provide services to consumers using two or more orbital positions and dual-feed or multiple earth station receivers. Such an approach would not be unreasonably burdensome to SES Americom.

Regardless of the inconvenience that might result, however, the Commission cannot permit SES Americom to move forward with its plan to provide DBS service to 48 states and exclude consumers in Alaska and Hawaii. The Commission's overriding public interest goal is to promote the provision of competitive DBS service to consumers in all fifty states.¹² This goal must outweigh the desire of any individual satellite operator

¹¹ The U.S. has access to DBS orbital assignments that are currently unused by DBS operators. *See id.*, ¶ 13. Furthermore, the Commission is expected to authorize the use of a new DBS spectrum band (17.3-17.7 GHz) beginning in April 2007. *See* 47 C.F.R. § 2.106 n.NG163 (2001).

¹² When the Commission created the DBS service, it observed that its “obligation ‘to encourage the larger and more effective use of radio,’ 47 U.S.C. § 303(g), requires that we fully utilize the satellite technology offered by DBS to improve services to underserved areas of the nation.” *Direct Broadcast Satellites*, 90 FCC 2d 676, 686 (1982) (“1982 DBS Order”) (citing 47 U.S.C. § 303(g)). The Commission also cited to Section 307(b) of the Communications Act, which includes “the statutory goal of providing *equitable* distribution of service throughout the nation,” *Id.* at 680 (citing 47 U.S.C. § 307(b)) (emphasis added), and Section 151 of the Act, which mandates a “rapid, efficient, *Nation-wide*, and world-wide wire and radio communication service.” 47 U.S.C. § 151 (emphasis added); *see also* 1995 DBS Order, 11 FCC Rcd at 9800 (citing 47 U.S.C. § 151).

to provide service in the United States using a particular orbital position or frequency band.

Most importantly, the Commission must require SES Americom to complete coordination for its proposed satellite before any authorization is granted. If SES Americom is permitted to move forward with development of a satellite network that is capable of serving only 48 states, it will be difficult, if not impossible, to correct the inequity after the satellite has been built.

Respectfully submitted,

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